

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>MARY B. HETZEL</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,008,992
<b>SHADY BROOK ESTATES</b>	)	
Respondent	)	
AND	)	
	)	
<b>STATE FARM INSURANCE</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent appeals the September 2, 2003 preliminary hearing Order of Administrative Law Judge John D. Clark. Claimant was granted benefits after the Administrative Law Judge determined that claimant was an employee of respondent and the injury she suffered arose out of and in the course of that employment.

**ISSUES**

- (1) Is claimant an employee of respondent or is claimant, instead, an independent contractor?
- (2) Did claimant suffer accidental injury arising out of and in the course of her employment with respondent?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

On September 4, 2002, both claimant and her husband, Eldon, entered into a contract with respondent when they signed a document titled Independent Contractor Verification. This document, prepared by respondent, clearly sets out that claimant and her husband are independent contractors, with specific listings of the relationship claimant and her husband had with respondent. The document, however, does not go into specifics regarding what duties claimant and her husband were required to provide.

Claimant testified that when they first contacted respondent, it was in response to an advertisement as a maintenance person. However, claimant stated that after being hired, they were given additional responsibilities and the title of assistant managers. This testimony by claimant is supported by the October 2002 Shady Brook Estates newsletter distributed by claimant's supervisor, Evelyn Jackson (respondent's on-site manager). In that newsletter, Ms. Jackson identified claimant and her husband as "my assistants." She went on to state that they were doing a great job with the cleaning and further identified the maintenance individual as a gentleman named Glenn Miller.

As claimant and her husband became familiar with the job and as the residents of Shady Brook became familiar with claimant and her husband, they began accepting more and more responsibilities. They took on some of the maintenance duties which were assigned to Glenn, testifying that Glenn's health prevented him from doing some of the more difficult jobs. There was also uncontradicted testimony by both claimant and her husband that although several of the maintenance requests prepared by Ms. Jackson indicated the work had been done by Glenn, the work was, instead, done by claimant and her husband. Apparently, Glenn, whose health was poor, needed assistance doing some of the jobs, and claimant and her husband did not object to Glenn getting credit for some of the work that they performed.

Additionally, several of the maintenance requests which noted Glenn as the worker, were prepared in handwriting other than Glenn's. Another section indicated that, while Glenn may have been involved in the project, he had assistance in performing some or all of the activities.

The Independent Contractor Verification form specifies that neither claimant nor her husband was required to work exclusively for respondent. However, both claimant and her husband testified that the work was so involved that they were required to be available 24 hours a day, seven days a week. They went on to state that residents would knock on their door all hours of the day and night, requesting assistance in making minor repairs. Many of these repairs were as simple as replacing a light bulb or lighting a pilot light. In addition, claimant and her husband were responsible for the cleaning of the common areas.

Claimant stated that on November 8, 2002, she was working in an area outside one of the exterior doors. That area was frequented by some of the residents as a smoking area. Additionally, it was a landing site for numerous birds in the area, resulting in a buildup of bird droppings. Claimant testified that she was cleaning the bird droppings in order to make the area more usable and healthy.

Respondent alleges that all of the tools being used by claimant were provided by claimant and her husband from their former cleaning business. However, on the date the

bird droppings were removed, claimant borrowed a shovel from respondent in order to complete the job.

After cleaning the bird droppings, claimant began experiencing breathing difficulties. She testified to having difficulties with her eyes, her ears, her nose and her throat. Claimant obtained medical care through her personal physician, Dr. Terry Summerhouse, and was provided antibiotics. The antibiotics did not help claimant, and, after a discussion with a pharmacist, claimant went to the emergency room and further requested a transfer to Dan E. McCarty, D.O., for treatment.

Claimant ultimately came under the care of pulmonary disease specialist Douglas R. Livingston, D.O., who first examined claimant on November 20, 2002, some twelve days after the date of accident. He diagnosed claimant with asthma, testifying that asthma can develop "at any stage of life in individuals who have some exposure." He identified claimant's specific condition as "reactive airway dysfunction", stating that an asthmatic response may occur in patients even without a prior asthma history.

When claimant provided her medical history to Dr. Livingston, several earlier breathing problems, which claimant had experienced, were not discussed. Dr. Livingston was not made aware of claimant's bronchitis and pneumonia exposures, nor the treatment provided for those conditions several years before the date of accident. He testified, however, that even with the prior history provided him by respondent's attorney, in his opinion, claimant still developed an asthmatic response as a result of her exposure to the bird droppings.

Respondent contends that claimant's relationship was that of an independent contractor, arguing that the lack of control by Ms. Jackson, coupled with the fact that claimant and her husband were paid a lump sum of \$400 per month, plus the free use of an apartment, all utilities included, was more an indication of an independent contractor relationship than that of an employer-employee. Additionally, respondent argues that respondent had little or no control over how claimant performed her duties, but was interested merely in the work product. The Board acknowledges that the living arrangements and the payment relationship does resemble that of an independent contractor. But, the work duties and responsibilities of claimant and her husband appeared to have evolved during their stay with respondent. The initial advertisement indicated the job was that of a maintenance position. However, after hire, claimant and her husband were identified more as Ms. Jackson's assistants, with their job responsibilities increasing during their stay with respondent. This indicates that the independent contractor relationship, initially anticipated, developed into a more conventional employer-employee relationship as the situation between claimant and respondent modified.

After the bird-dropping incident, claimant and her husband notified respondent that they would be unable to remain at the facility due to the concerns about claimant's ongoing

health. Claimant's husband had a conversation with the owner of respondent corporation, a Bert Chicone (who is identified as the president of Medici Properties, Inc., from Nogales, Arizona). During this conversation, a disagreement arose between claimant's husband and Mr. Chicone about whether claimant cleaned up the bird droppings as a volunteer or whether she was required to do so as part of her job responsibilities. As a result of the dispute, Mr. Chicone immediately terminated both claimant and her husband. Shortly after that, on February 28, 2003, claimant and her husband left respondent's facility.

In workers' compensation litigation, it is claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.<sup>1</sup>

The Workers Compensation Act is to be liberally construed to bring employers and employees within its provisions and protections.<sup>2</sup>

It is often difficult to determine in a given case whether a person is an employee or an independent contractor since there are elements pertaining to both relationships which may occur without being determinative of the relationship.<sup>3</sup>

There is no absolute rule for determining whether an individual is an independent contractor or an employee.<sup>4</sup>

The relationship of the parties depends on all the facts, and the label that they choose to employ is only one of those factors. The terminology used by the parties is not binding when determining whether an individual is an employee or an independent contractor.<sup>5</sup>

The primary test used by courts in determining whether the employer-employee relationship exists is whether the employer has the right of control and supervision over the work of the alleged employee and the right to direct the manner in which the work is to be performed, as well as the result that is to be accomplished. It is not the actual interference

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<sup>1</sup> K.S.A. 44-501 and K.S.A. 2002 Supp. 44-508(g).

<sup>2</sup> K.S.A. 44-501(g).

<sup>3</sup> *Jones v. City of Dodge City*, 194 Kan. 777, 402 P.2d 108 (1965).

<sup>4</sup> *Wallis v. Secretary of Kans. Dept. of Human Resources*, 236 Kan. 97, 689 P.2d 787 (1984).

<sup>5</sup> *Knoble v. National Carriers, Inc.*, 212 Kan. 331, 510 P.2d 1274 (1973).

or exercise of the control by the employer, but the existence of the right or authority to interfere or control that renders one a servant rather than an independent contractor.<sup>6</sup>

In addition to the right to control and the right to discharge the worker, other commonly recognized tests of the independent contractor relationship are: (1) the existence of a contract to perform a piece of work at a fixed price; (2) the independent nature of the worker's business or distinct calling; (3) the employment of assistants and the right to supervise their activities; (4) the worker's obligation to furnish tools, supplies and materials; (5) the worker's right to control the progress of the work; (6) the length of time that the worker is employed; (7) whether the worker is paid by time or by the job; and (8) whether the work is part of the regular business of the employer.<sup>7</sup>

The Board notes that claimant and her husband did not receive a W-2, but, instead, were provided a 1099. But the Board considers that to be just one aspect of the overall relationship between claimant and respondent.

Based upon the facts contained in the record, the Board concludes that for the purposes of the Workers Compensation Act, claimant was an employee of respondent. While the independent contractor contract indicates that claimant was not exclusive to respondent, both claimant and her husband testified that their duties required that they be available 24 hours a day, seven days a week, with no time for independent business. Claimant and her husband maintained an ongoing working relationship with Ms. Jackson, respondent's manager, obtaining maintenance requests from Ms. Jackson's office on a regular basis, although it is acknowledged that Ms. Jackson did not need to supervise the daily activities of claimant, as both claimant and her husband were well-versed in cleaning, having run their own cleaning company for several years.

Additionally, the work performed by claimant and her husband was an integral part of respondent's business, as the maintenance of the areas and the assistance of the residents, many of whom were mentally challenged, was a necessary, ongoing responsibility.

And, finally, while claimant and her husband provided numerous tools, it is noted that certain tools, specifically the shovel used by claimant on the date of accident, were provided by respondent. Also, there is no indication that claimant and her husband provided any of the cleaning supplies which would have been used in maintaining the common areas of respondent's facility.

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<sup>6</sup> *Wallis* at 102-103.

<sup>7</sup> *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994).

The Board finds claimant has proven that she was an employee of respondent for purposes of the Kansas Workers Compensation Act on the date of accident and that the injury, occurring on November 8, 2002, as a result of the exposure to the bird droppings, did arise out of and in the course of that employment relationship. The Board, therefore, finds that the determination by the Administrative Law Judge that claimant suffered accidental injury arising out of and in the course of her employment should be affirmed.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order of Administrative Law Judge John D. Clark dated September 2, 2003, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November 2003.

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BOARD MEMBER

c: Jack Shelton, Attorney for Claimant  
P. Kelly Donley, Attorney for Respondent  
John D. Clark, Administrative Law Judge  
Paula S. Greathouse, Director